
OBVIOUSNESS

Donald J. Kochan*

This Essay defends the virtue and utility of stating the obvious from time to time, even inside rigorous academic analysis. And, like Professor Orin Kerr's A Theory of Law, it aims to provide a citable source for obvious statements and for the contextual utility of stating obvious things. It fills a gap, because it may be impossible to find a source for obvious claims. As a solution, an author can cite to this Essay to (1) make a contestable assertion that the point is obvious and need not cite any other sources; and (2) to defend the scholarly utility of sometimes making obvious statements in academic work. The Essay also explains that the citation to it can serve a deliberative function. Such citation allows an author to clarify that they are staking a transparent claim that the statement to which this citation is appended is an obvious one, thereby directly welcoming peer criticism or contrasting challenge that the claim is instead non-obvious.

I. INTRODUCTION

Can the obvious be worth stating? Certainly the answer is yes, despite our biases to often disparage the exercise with clever retorts when someone “states the obvious.” This Essay explains why stating the obvious is often necessary or useful in the course of advancing thought. It also provides an (additional) exemplary citation for obvious statements that may, in fact, be so obvious as to not yet have been stated in published form yet for which a law review editor has requested a citation. There is, indeed, a robust category of material often included in scholarship for which law review editors demand supporting authority where, predictably and for good reason, no such supporting authority may exist—the statements of the obvious—which might also be regarded as statements of common sense, generalized knowledge, or (likely) uncontestable fact.

Consequently, this Essay builds on Professor Orin Kerr's unique essay, *A Theory of Law*, where he provided a source to be generically cited for, *inter alia*, those “claims [that] are so obvious or obscure that they have not been made before.”¹

* Professor of Law and Executive Director of the Law & Economics Center, George Mason University Antonin Scalia Law School.

1. Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012). For excellent and entertaining replies to Professor Kerr's innovative essay, see *Micro-Symposium on Orin Kerr's "A Theory Of Law,"* 16 GREEN BAG

In other words, this Essay is designed to defend the virtue and utility of stating the obvious from time to time, even inside rigorous academic analysis. And, like Kerr's *A Theory of Law*, aims to provide a citable source for obvious statements and for the contextual utility of stating obvious things.

The Essay has three modest goals. Part II provides the framework for using this Essay as a citation. It first explains the gaps in the literature that may make it impossible to find a source for obvious claims. And, in an effort to make the Essay additive and more useful than prior existing work, it also explains that the citation to this work allows an author to clarify that they are making a transparent claim that the statement to which this citation is appended is an obvious one, thereby directly welcoming peer criticism or contrasting challenge as non-obvious. Part III explains that making obvious statements is both unavoidable and useful. And, finally, Part IV posits that some matters that may seem "obvious" may be independently worthwhile in and of themselves as pursuits of scholarly inquiry or explication. Together, these parts demonstrate the ubiquity and utility of, at least sometimes, exploring the obvious.

II. A RESOURCE AS A TESTABLE CITATION TO FILL A GAP IN THE LITERATURE

I know that I am not alone as an author who has found themselves responding to student editors looking for a citation for a point in one of my articles that represents a proposition of obviousness. Yet, the student editors believe the proposition should have support through citation to a factual or scholarly source. It is sometimes difficult to convince those editors that the point is obvious, meaning it should not require support and because it is obvious no one may have reduced the obvious point into prior writing such that there is anything out there to which to cite.

Indeed, as I explain in more detail in this Part, there is every reason to believe that finding citations to support claims that are obvious is often extremely difficult if not impossible. For all those situations, I hope *this* Essay can serve as the citation. The parenthetical to that citation can read: "This point is sufficiently obvious and accepted as such that it neither requires a citation nor would one likely be found precisely because it is too obvious or indisputable to have generated significant scholarly attention." The remaining subparts walk through this function.

A. *The Futility of Finding Sources to Cite for Obvious Things*

Obvious points don't always get written down. And they do not become major focuses of academic work. The incentives are not there for them. Few academics get tenure and popular press writers do not get clicks for writing articles about obvious things. Generally, and despite my claims in Part IV about the

occasional benefits of directing scholarly pursuits to things obvious,² tenure reviewers are looking for unique contributions to the literature that are creative and new, not statements of known and indisputable points of obviousness. Similarly, journal editors are not looking to accept works focused on obvious things for publication for the same reasons. They want to publish the clever and creative new research that breaks ground. Authors are not incentivized to create works that neither help advance their careers nor fit the criteria for publishers.

Law review editors should allow authors to make obvious statements without citation, recognizing that there is a high likelihood no such citation exists because, since the matter is obvious, few would have considered publishing an article supporting the point. It is in our nature as academics to not examine the obvious.

But that restraint may not happen. While it may seem a footnote should not be necessary,³ it might be requested nonetheless given the entrenched and risk-averse footnoting culture of law reviews and other journals.

Law review editors may demand a citation or justification for statements of, to the author's mind at least, the obvious. This may then lead the author on a precarious pursuit. An obvious point will not always be easily supported because people often don't write scholarly articles pointing out obvious things. Thus, beyond just being a hunt for an elusive source, it may indeed be a futile search for a nonexistent source. And, it can be a high transaction cost battle with the law review editors to convince them it does not need a citation.

In essence, this Essay elaborates on a point made very effectively by Kerr in *A Theory of Law*, an essay also, at least in part, designed to serve a very similar function to what this Essay in part also intends. Professor Kerr noted the frustration some authors have when editors, student editors of law journals especially, are overzealous in demanding that an author provide a citation for almost everything they state in an article.⁴ Kerr created a short two-paragraph that could be generically cited when other sources would understandably be absent since "[s]ome claims are so obvious or obscure that they have not been made before."⁵

B. "Obviousness" as an Essay Useful as a Source for Citation

So, given that the obviousness of the claim may mean that no one has yet stated it in a published source, an author will be up against an impossible task when the law review editor asks for a citation. As a solution, that author can then

2. See *infra* Part IV.

3. For example, under the rules of evidence, neither expert nor general witnesses are permitted to testify on matters of common knowledge, meaning there is no need for a citation in the record to support a jury using it. Similarly, a "court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201, https://www.law.cornell.edu/rules/fre/rule_201 [<https://perma.cc/7J56-57Y6>]. The parties in litigation need not cite to anything or even always request it, in order to receive the benefit of judicial notice of the kinds of obvious things anticipated in Rule 201.

4. Kerr, *supra* note 1.

5. *Id.*

cite to this Essay to (1) make a contestable assertion that the point is obvious and need not cite any other sources; and (2) to defend the scholarly utility of sometimes making obvious statements in academic work.

This Essay helps fill the void by supporting the idea that obvious things are sometimes worthwhile or necessary to state, and it gives authors a generic citation source for obvious things. Most practically, this Essay can be cited, in conjunction with the work of Kerr,⁶ for the proposition that there are some statements made by authors that are obvious and, therefore, need not be propositions supported by citation to published sources (other than perhaps this Essay as the backstop). To borrow from Professor Kerr's phrasing, "[i]f you have been directed to this page by a citation elsewhere . . .,"⁷ then this Essay serves as the exemplary placeholder for a requested citation when the proposition being supported is obvious, with the added value of also citing to this page as supporting the idea that making obvious statements in scholarship has value, as outlined principally in Parts II.C, III, and IV of this Essay.

C. Express Reliance on "Obviousness" Signals Author's Conclusion and Creates Environment for Testable Claims of Obviousness

Finally, relying on something as obvious should always remain open to ex post arguments that the thing asserted is not, in fact, obvious. In other words, an author should be free to expressly or impliedly assert something is obvious and open themselves up to criticism after the fact that their claim of obviousness is in fact not truly obvious.⁸ An express citation to obviousness signals to the world that the author is willing to defend their conclusion as obvious. The author becomes invested in that contention. And, an author will be incentivized to take greater care in assuring themselves in their belief of the obviousness of the claim if they know that they are staking it through such a citation. In light of all of this, the author should not be expected to defend the obviousness of the claim ex ante to a journal editor or provide scholarly citations in order to advance an obvious proposition, for the consequences of making such an error will be internalized by such a staking process.

* * *

For those readers using this article for that gap-filling citation purpose, you might wish to stop reading here. But, for those interested in a deeper discussion of the utility of obviousness, the rest of this essay takes that road.

6. *See generally id.*

7. *Id.*

8. In an ever-changing and increasingly polarized world, I venture to guess that size of the set of the number of things upon which a consensus can be garnered that such-and-such is indeed obvious is shrinking.

III. THE REGULAR NECESSITY TO INCLUDE OBVIOUS STATEMENTS WITHIN MORE RIGOROUS INQUIRY

Obvious statements sometimes need to be made in academic scholarship in the course of developing more detailed analyses or conclusions. Editors should appreciate that reasoning often requires drawing on common sense, logic, generally accepted knowledge, and other matters of obviousness in the course of one's exposition of their research.

Sometimes an obvious point is a necessary logical step or analytical building block to a more profound conclusion or is one step in a series of propositions necessary to make a unique contribution to an area of inquiry. Thus, editors should expect that an author, in the course of developing their most important scholarly contribution, will need to progress through a series of obvious statements along the way. Barriers to doing so, including excessive requests for citations to authority to footnote the obvious, may clutter the work and will certainly add probably unnecessary transaction costs to the article production process.

Creative and unique projects will need to use obvious points inside their larger nonobvious works. It will sometimes be important to remind readers of obvious things so that they may follow along and understand the development of an argument or analysis. Authors also sometimes need to worry that the reader may not recall the obvious while reading. Further, the authors may be concerned that biases may even cause the reader to suppress the obvious unless they are pointed to it.

IV. THE UTILITY OF EXPLORING THE OBVIOUS AS A MATTER OF ACADEMIC INQUIRY

Obvious subjects might actually be worthy of scholarly exploration and not just building blocks within other scholarly pursuits. This may be a very small set of things, but I mention it here to ponder further whether we too quickly dismiss rewarding publication to works devoted to obvious propositions in the main. Perhaps we too quickly dismiss giving credit in professional advancement for injecting into the literature a defense or examination of an obvious point.

It will sometimes be academically beneficial to devote an entire research project to defending an obvious point. In other words, peer reviewers and journal editors often presume that academic works focused on obvious things are categorically non-scholarly. But this should be a rebuttable presumption at best. True, we do not want to reward with the label "academic scholarship" that to which no expertise is required or from which no intellectual progress is made. Yet, there are times when there is scholarly merit in pursuing a project that pursues the obvious, as the rigorous exploration and defense of the obvious claim may serve a variety of useful purposes meriting credit as a scholarly endeavor. An author pursuing the obvious alone—rather than simply acknowledging an obvious point as a very small part of a larger analytical endeavor, like in the category discussed above—will no doubt need to expressly explain how that hurdle is met before receiving such acceptance. And we should hear them out before

we dismiss their effort as non-scholarly. This Part raises just a few of the ways that the obvious may have independent merit as a matter of inquiry and why we should be careful not to fully disincentivize scholarly engagement targeted specifically and perhaps exclusively at seemingly obvious matters.

Sometimes writing about the obvious can be a powerful way to capture attention to a matter. As Thomas Green, a professor of philosophy and education at Syracuse University, has concluded, “[p]hilosophy starts when we seek to unearth the principle buried in the ordinary, when we seek to reveal the practice already present in the affairs of daily life.”⁹ Green continues:

One meaning of ‘ordinary’ is ‘usual,’ and the usual is usually, in the sense of ‘frequently,’ what is common, and therefore what we are at risk of thinking mundane and uninteresting. . . . The ordinary, that is, what is shared, is also commonly what is nearest at hand and therefore most likely to be overlooked. The ordinary ordinarily goes unnoticed.¹⁰

That the ordinary or obvious may be at risk of being missed if we label it unworthy of inquiry, though, is doubly troubling because the ordinary and obvious sometimes can be the most interesting and consequential subjects of study. Green stresses that “[t]he common, the mundane and uninteresting, the usual, what is near at hand—these are precisely the things that philosophy finds interesting, revealing, and often surprising. They are precisely what we have in common.”¹¹

Consider, for example, Thomas Paine’s *Common Sense*.¹² Celebrating its 250th Anniversary in 2026, this short but powerful pamphlet was, as its title reveals, aimed at calling upon the readers’ common sense to draw attention to, and persuade them that there were, uncontested truths about human nature and inherent limitations on just governments that should be obvious if they just took a minute to read the pamphlet and realize it.

As with political pamphleteering, using academic scholarship to remind people of obvious things might even be just enough “spark” and ignite a fruitful academic conversation. Wittgenstein’s words are relevant and supportive here:

The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one’s eyes). The real foundations of his enquiry do not strike a man at all. Unless *that* fact has at some time struck him.— And this means: we fail to be struck by what, once seen, is most striking and most powerful.¹³

9. Thomas F. Green, *Unwrapping the Ordinary: Philosophical Projects*, 100 AM. J. EDUC. 84, 85 (1991).

10. *Id.* at 85–86.

11. *Id.* at 86.

12. THOMAS PAINE, *COMMON SENSE* (Philadelphia, R. Bell 1776), <https://oll.libertyfund.org/pages/1776-paine-common-sense-pamphlet> [<https://perma.cc/KJ4V-JZDV>].

13. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS: THE GERMAN TEXT, WITH A REVISED ENGLISH TRANSLATION* Pt. I, ¶129 (G. E. M. Anscombe trans., Blackwell Publishing 3d ed. 2001) (1953). *See also* GUSTAV ICHHEISER, *APPEARANCES AND REALITIES: MISUNDERSTANDING IN HUMAN RELATIONS* 10 (1970) (“Psychologists and sociologists sometimes neglect obvious facts because they fail to realize their far-reaching implications.”).

The obvious may be profound. Consequently, unwrapping an obvious proposition for consumption may be a necessary predicate to realizing its power. As Green posits, “the ordinary may appear as a fresh discovery even though there is nothing in it we did not already know. The ordinary unwrapped can surprise us.”¹⁴

An obvious point may also deserve attention precisely because it is so obvious but too often ignored as to make its study intellectual instead. Green explains why we should embrace the unwrapping of what seems ordinary to find the lessons that hide beneath:

To unwrap the ordinary requires a certain naïveté, a capacity to simply take notice of what we know already, but persist in overlooking. To do so is to attain a difficult and hard-won kind of naïveté, a kind of simplicity in which the simplest matters near at hand are neither overlooked nor in need of justification. Taking note of the ordinary is to philosophy what parsimony is to science, a principal mark of its elegance.¹⁵

Similarly, Gustav Ichheiser’s work in social psychology concludes that, “[n]othing evades our attention as persistently as that which is taken for granted.”¹⁶ Arthur Conan Doyle’s plot lines in his Sherlock Holmes mysteries regularly capitalized on deduction from the existence or absence of things. To borrow one familiar passage, “[t]he world is full of obvious things which nobody by any chance ever observes.”¹⁷ Sometimes obvious is also in the interstices of what is present, i.e. what is not there and not just what is there, such as the hound that does not bark revealing it may have known the intruder. We cannot presume that the world will understand, perceive, or explore obvious things if no one talks to them about them. Thus, to the extent scholarship is designed to engage with untapped matters of consequence, igniting the obvious in the minds of readers may fit that enterprise.¹⁸

In fact, there may be a need for writers to express the obvious because of individual’s “tendency to neglect, or even to ignore, certain very important facts and problems because those facts and problems appear to be quite obvious.”¹⁹ As Ichheiser concludes, there are risks to claiming that something need not be stated because it is obvious: “[T]he contention that certain facts are ‘quite obvious’ must be considered not only as meaningless but even far worse than that: as

14. Green, *supra* note 9, at 86–87.

15. *Id.* at 103.

16. ICHHEISER, *supra* note 13, at 8. For more on Ichheiser’s work, see generally Floyd Webster Rudmin, Rüdiger M. Trimpop, Ilona-Patricia Kryl & Pawel Boski, *Gustav Ichheiser in the History of Social Psychology: An Early Phenomenology of Social Attribution*, 26 BRIT. J. SOC. PSYCH. 165 (1987).

17. Sir Arthur Conan Doyle, *The Hound of the Baskervilles*, in THE COMPLETE SHERLOCK HOLMES 571, 592 (George Stade et. al. eds., Barnes & Noble Classics 2003) (1902).

18. See ICHHEISER, *supra* note 13, at 8 (“[T]he social scientist should never be more satisfied with his achievements and more proud of his insight than when he succeeds in perceiving, in making explicit, and in incorporating into his theory of social reality certain obvious but perhaps for that very reason overlooked significant facts.”)

19. *Id.* at 7–8.

a device for blocking the analysis of basic phenomena and preventing the incorporation of these phenomena into a theory of human relations.”²⁰

We cannot presume that everyone is privy to what we as writers or as readers consider obvious. First, there is a high risk for all of us when we take too many things for granted without giving the time or attention to subjects which at first blush may seem prosaic, unremarkable, simple, ordinary, or obvious.²¹ As social psychologist Gustav Ichheiser warns, “[t]he fact . . . that something is obvious need not mean that it is explicitly noticed, registered, and scientifically taken into account. Instead, something of the opposite is true. Obvious facts tend to remain invisible.”²² Blind spots creating that invisibility can emerge because of lack of exposure or biases. Blind spots also result from rational ignorance, a phenomenon that exists because each individual experiences time as a scarce resource and will sometimes simply remain ignorant of even obvious things because the cost to learn of them outweighs the benefits. Indeed, scholarship highlighting obvious things may serve utility by providing a low-cost resource for exposure to things to which someone might, but for the scholar using the pen to point out the obvious, otherwise remain rationally ignorant, unexposed, or influenced by bias.

We should not presume something is *observed*—in a vacuum or in practice—simply on the basis that it is obvious. It should not be taken for granted that individuals recognize and honor seemingly obvious lessons. Indeed, obvious things can seem so obvious that our failure to take the time to reflect on them leaves them ignored. Alfred North Whitehead, the well-regarded philosopher and mathematician stated it this way: “Familiar things happen, and mankind does not bother about them. It requires a very unusual mind to undertake the analysis of the obvious.”²³ At times, scholars may be valuable by unpeeling the obviousness of something to understand its rich core.

V. CONCLUSION

The inclusion of obvious statements in academic scholarship should be encouraged when they are useful. Indeed, entire articles devoted to points seemingly obvious might even have scholarly value. And, from time to time, when authors need a citation for obvious statements for which, understandably, no specific authority exists, this Essay can serve that role.

20. *Id.* at 11.

21. ALDOUS HUXLEY, THEMES AND VARIATIONS 69 (Harper & Row 1970) (1950) (“Most human beings have an almost infinite capacity for taking things for granted.”). Dukeminier et al. explain this in relation to understanding the origins of property law: “How does property come to be, and why, and so what? Most of us most of the time take these questions for granted, which is to say that we take property for granted. But taking something for granted is not exactly the best path to understanding it.” JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 3 (10th ed. 2022).

22. ICHHEISER, *supra* note 13, at 8.

23. ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD 5 (1925).